Given what I have said, I accept the evidence of the Accused that one Inin had placed the cannabis (which was hidden in a tyre tube) in her stall and that she was caught holding the cannabis when she was about to return the same to Inin who came to collect the same with another person who later arrested her. I also accept her evidence that she did not know that there was cannabis hidden inside the tyre tube. Even if I am not justified in preferring the version of the Accused as to what happened that day, her version, for the reasons which I have earlier set out, nevertheless, creates a doubt as to whether she knew the plastic bag contained cannabis. I therefore discharge and acquit the Accused. The cannabis is to be destroyed after the disposal of the appeal herein or after the time limited for appeal, whichever is later, by burning in the compound of the Court and to be witnessed by the Senior Assistant Registrar of the High Court in Borneo at Tawau.

PUBLIC PROSECUTOR

v.

CHIA AH YU

HIGH COURT, ALOR SETAR
TUAN MOHD. NOOR BIN HJ. ABDULLAH JC
[CRIMINAL TRIAL NO. 47-4-90]
9 JUNE 1993

DANGEROUS DRUGS: Charge of trafficking in opium - Statutory presumptions raised against accused - Whether evidence of accused had rebutted presumptions raised.

EVIDENCE: Evidence given by accused contradictory to contents of cautioned statement - Cautioned statement not tendered in evidence - Whether cautioned statement could be used to impeach credit of accused.

The accused was charged with trafficking in dangerous drugs, namely raw opium, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The accused was stopped while riding a motorcycle with a black bag between his legs. The bag was found to contain two packages which upon examination were found to contain raw opium with a combined net weight of 3720.1 grammes.

The accused claimed that he had borrowed the motorcycle from a co-worker and that when he was about to use it he noticed the black bag on the carrier of the motorcycle. He claimed that he did not examine the bag and that he rode on the motorcycle with the black bag intact. The accused said that he had used the motorcycle before, others likewise and the owner of the motorcycle so admitted. The question that arose was whether the accused's evidence was capable of rebutting the statutory presumptions of trafficking and knowledge that had been raised against him.

In the course of the accused's evidence the prosecution sought to impeach the credit of the accused by using the cautioned statement made by the accused which statement was not produced by the prosecution nor the defence during the case for the prosecution.

Held:

[1] The prosecution was entitled to use the cautioned statement in cross-examination and for the purpose of impeaching the credit of the accused for otherwise the clause "and, if such

person tenders himself as a witness any such statement may be used in cross-examination and for the purpose of impeaching his credit" contained in s. 37A(1) of the Act becomes inoperative.

[2] The credit of the accused could not be said to have been impeached by reason of the contradictions between the statements made in the cautioned statement and the accused's evidence in Court. In evaluating the whole of the accused's testimony and his cautioned statement, the Court could not accept his cautioned statement as true and reject his testimony as false.

[3] Having considered the defence in its totality, it was found that the defence had rebutted on the balance of probabilities that the accused knew that the contents of the black bag which was found under his control and custody was raw opium. The accused had also rebutted on the balance of probabilities the presumption that he was trafficking in the raw opium.

[Accused acquitted and discharged of the charge].

Cases referred to:
Queen v. Woodrow 16 CJMC 122 ***(refd)***
Chiah Tian v. Rex [1937] MLJ 105 ***(refd)***
Public Prosecutor v. Loo Keck Leong [1991] 3 CLJ 2584 ***(refd)***
Shamsuddin bin Hassan & Anor. v. Public Prosecutor [1991] 3 CLJ 2414 ***(refd)***
Public Prosecutor v. Veeran Kutty [1990] 3 MLJ 498 @ 502 ***(refd)***
Public Prosecutor v. Samsul Kamar b. Mohd. Zain [1988] 2 MLJ 252 ***(refd)***
Muthusamy v. Public Prosecutor [1948] 14 MLJ 57 ***(dist)***
R v. Pearce [1979] 69 Cr App R. 365 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da), 37A(1), 39B(1)(a) & (2)
Criminal Procedure Code, ss. 112, 113

Other sources referred to:
Archbold's Pleading, Evidence and Practice in Criminal Cases, 42nd. Edn., p. 1118

For the public prosecutor - Shamsuddin b. Hassan, DPP
For the accused - R.S. Maniam; M/s. R.S. Maniam & Co.

JUDGMENT

Mohd. Noor Bin Hj. Abdullah JC:

The charge

The Accused person was charged with trafficking in a dangerous drug, namely raw opium weighing 3,720.1 gram on 22 July 1989 at about 9.25 a.m. at Lorong Terusan Wan Mat Saman near the junction of Jalan Kuala Kedah/ Lebuhraya Sultan Abdul Halim, Alor Setar, Kedah, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable on conviction with death under s. 39B(2) of the Act.

The established facts

Acting on information received PIKT Osman Omar (PW3) triggered an ambush by assigning PIKP Mohd. Selamat (PW2) at one location to watch out for motorcycle No. KJ 4282 whilst he and his officers took up position at another location some distance away. After a while PW2 spotted the marked motorcycle. A big size man wearing a helmet was riding on it. PW2 saw a black bag on the carrier between the rider's legs. It was clearly visible. PW2 alerted PW3 who then scanned and followed the motorcyclist for about 2 kilometers when the motorcyclist sidetracked into Lorong Terusan Wan Mat Saman. Here PW3 stopped him and searched him. PW3 found a black plastic bag tucked to the carrier of the motorcycle No. KJ 4282. PW3 examined the bag and found it to contain two packages of drug. He informed his superior officer Supt. Yusof Omar (PW4) who arrived at the scene later.

Supt. Yusof Omar conducted an investigation at the scene and brought the motorcyclist, the motorcycle and the two packages to the custom's office in Alor Setar where PW4 repacked the two packages containing the drug into a box - labelled and sealed - and sent it to a chemist Mr. Tan Teik Siew (PW1) of the Chemistry Department P. Pinang. PW1 examined and analysed a black sticky substance found in the two packages and certified that it was raw opium and the combined nett weight was 3720.1 grammes.

3. *Statutory presumptions and finding*

In a prosecution for an offence of trafficking in a dangerous drug, namely raw opium, the prosecution may, in order to prove the charge against the accused invoke the aid of two statutory presumptions contained in the Act namely the presumption that the accused, if he was found in possession of 1,000 gram or more in weight of raw opium was trafficking in the said drug and the presumption that the accused, if he was found to have had in his custody or under his control anything containing dangerous drug, was in possession of the drug and knew its nature. In that event the prosecution is relieved

of having to prove that the Accused was doing any of the acts, that is to say manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs which act constitutes "trafficking" as that term is defined in the Act. Likewise the prosecution is further relieved of having to prove that the accused was found **in possession of the dangerous drug and knew its nature**. Needless to emphasise it would render the two statutory presumptions nugatory and the purpose nullified if the prosecution is required to prove facts which are presumed to exist.

It was the finding of this Court that there was no evidence that the accused was doing any of the acts which constitute 'trafficking' as defined although the accused was seen carrying the black plastic bag which is distinct from carrying a dangerous drug namely raw opium contained in the plastic bag. It was also the finding of this Court that the accused was not found **in possession of the dangerous drug** in the sense that he knew of the drug or was conscious of his possession or had knowledge that the drug was raw opium. Pullock CB stated in the *Queen v. Woodrow* 16 CJMC 122 cited in *Chiah Tian v. Rex* [1937] MLJ 105 - "a man can hardly be said to be in possession of anything without knowing it and I think a person is not guilty of the offence of possession if he was not aware of the possession."

It was a further finding of fact that there was no evidence from which a reasonable inference could be drawn that the accused knew of the drug contained in the plastic bag either from his conduct or from his statement.

However I found as a matter of fact and law that the accused had in his custody or under his control the black plastic bag containing the drug - tucked to the carrier of the motorcycle. I had considered in coming to this conclusion factors such as the size and colour of the bag, its space and position in relation to the Accused, a heavyweight riding on an 80 cc. motorcycle for over 2 kilometers. The accused under these circumstances must have known of the existence of the black plastic bag - though not of its contents - because its existence was so probable that a prudent man ought to act upon the supposition that it existed. The plastic bag was under the care of the Accused in the sense that he knew it was there and had the means of exercising control over it. He also watched over it and kept it safe and secured on the carrier. He had control of the plastic bag arising from the relationship of the Accused to the plastic bag.

In *Public Prosecutor v. Loo Keck Leong* [1991] 3 CLJ 2584 the Accused was charged with trafficking in a dangerous drug under s. 39B(1)(a) of the Act. The drug was found in a bag which the accused carried on his left shoulder and in another plastic bag which he carried in his right hand. K.C. Vohrah J., stated (at page 2586) "On a *prima facie* basis the primary facts showed that the evidence was that the Accused was in control and custody of the bag containing the plant material, that is, the drug cannabis. That being so he is presumed under s. 37(d) to have been in possession of the drug cannabis until the contrary is proved he is presumed to have known the nature of the drug."

In *Shamsuddin bin Hassan & Anor. v. Public Prosecutor* [1991] 3 CLJ 2414 the appellant was convicted and sentenced to death by the High Court on a charge of trafficking in dangerous drugs. At the trial, it was revealed that the police were pursuing the car in which the appellants were travelling. A bundle was thrown out of the car but the police could not identify the person who threw it away. The bundle was found to contain cannabis. In allowing the appeal, Harun Hashim SCJ, stated:

> The learned Judge had not made any finding as to who threw out the bundle from the car. There is no evidence that the pillow case stuffed with drugs were shown to the appellants after their arrest or that they were confronted with this evidence. It was contended that the presumption of knowledge under s. 37(d) of the Act arose from the fact that the drugs were thrown out of the car. In our view this fact alone is insufficient in this instance to establish control or custody. It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.
>
> There was accordingly no evidence of custody or control of the drugs to raise the presumption under s. 37(d) of the Act that the appellants were in possession of the drugs and the further presumption that they must have known that the drugs were cannabis. Until this can be proved the presumption under s. 37(da) of the Act that the

appellants were trafficking in dangerous drugs does not arise.

At the close of the case for the prosecution on these facts as established and applying the statutory presumptions and attaching the meaning of the relevant terms and expressions contained therein as are decided by case law, the Court concluded that the prosecution had made out a case against the accused which if unrebutted would warrant his conviction of the charge and thereupon called the accused to enter his defence.

The defence

At 7 o'clock that morning the Accused went to work as a lorry attendant at his employer's house and finding that no lorry had returned from outstation he decided to go for breakfast. He saw a motorcycle No. KJ 4282 parked there with the ignition key and helmet on it usually left by the owner, a co-worker for use by his employer and others. He was about to ride on it when he noticed a black plastic bag on the carrier of the motorcycle. He did not examine it nor check its content. He rode on the motorcycle with the plastic bag intact. On his return journey he was stopped and arrested by the customs officers. He maintained that he did not know what was contained in the plastic bag. He said he had used the motorcycle before, others likewise and the owner so admitted.

The learned Deputy Public Prosecutor cross-examined the Accused for one hour but he failed substantially to dislodge the defence and thereupon applied to impeach the credit of the Accused by using the Accused's cautioned statement which statement was not produced by the prosecution nor by the defence during the case for the prosecution. The learned defence Counsel objected to its production, use and admissibility on the ground that it was improper, irregular and untimely at this stage of the trial.

The Court had no hesitation to rule that the prosecution may use the cautioned statement in cross-examination and for the purpose of impeaching the credit of the Accused for otherwise the clause "and, if such person tenders himself as a witness any such statement may be used in cross-examination and for the purpose of impeaching his credit" contained in s. 37A(1) of the Act becomes inoperative. The use of such statement is subject of course to the pre-requisites and the provisos therein being complied with or otherwise proved. I found support for this decision in *Public Prosecutor v. Veeran Kutty* [1990] 3 MLJ 498 @ 502 where Peh Swee J., stated:

> Application for impeaching the credit of the first Accused was made to Court and the Court allowed the application to proceed on account of *prima facie* material discrepancies between the first Accused's evidence and certain passages in the statement which was in fact the cautioned statement of the first accused. A trial within a trial was again held. The discrepancies would be set out later.

In another case - *Public Prosecutor v. Samsul Kamar b. Mohd. Zain* [1988] 2 MLJ 252 - where a portion of the accused's cautioned statement was admitted in a *voir dire* during the case for the defence K.C. Vohrah J., observed:

> The prosecution can call witnesses in rebuttal to show that the latter part of the statement was voluntarily made and if the court determines it was voluntarily made, that part of the statement may be used in cross-examination and for the purpose of impeaching the credit of the Accused on the narrow issue that he states facts contrary to the facts mentioned in the first part of the statement.

However the Court had some reservation as to the procedure of impeachment especially where the former statement sought to be used is a cautioned statement unlike a statement not being a cautioned statement, made under s. 112 of the Criminal Procedure Code. The practice has always been to follow the procedure laid down in *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57 where Taylor J., stated:

> The proper way to apply the section is this, on the request of either side the Court reads the former statement. If there is no serious discrepancy the Court so rules and no time is wasted. The first necessity is to read it with confident expectation that it will be different from the evidence but looking judicially to see whether the difference is so serious as to suggest that the witness is unreliable.

In practice the prosecutor/defence underlines the alleged discrepancies in the former statement and the Court after perusing them decides whether they are material discrepancies, in which event the prosecution/defence is allowed to cross-examine the witness for the purpose of impeaching his credit.

The case before this Court is distinguishable which in the Court's view warrants a departure from such practice. Firstly, it is noteworthy that the statement with which the prosecution sought to impeach the credit of the Accused is a cautioned statement purportedly made under s. 113 of the Criminal Procedure Code. Secondly, the statement must necessarily be incriminatory. Hence such statement if perused by the Court be it in parts underlined and for the limited purpose of determining whether such underlined statement amounts to material discrepancies before conducting a *voir dire* to determine its voluntariness and admissibility would adversely affect the Accused and materially prejudice the mind of the Court sitting as Judge and jury and if any event the making of such statement subsequently appears to the Court in a *voir dire* to have been caused by any inducement, threat or promise or otherwise becomes inadmissible the Accused has been highly prejudiced thereby. It is easier said than done for the Court to obliterate that piece of prejudicial evidence from its mind. I may add that in a drug trafficking offence where the prosecution relies heavily on statutory presumptions the Court must be vigilant at all times to refrain from hearing such oral evidence deliberately prompted which having been said is aborted or retracted when challenged or from provisionally admitting documentary evidence which subsequently after due deliberation is found to be inadmissible.

Here the Court without perusing the underlined parts of the cautioned statement then called upon the prosecution to prove in a *voir dire* the admissibility of the cautioned statement. The prosecution called three witnesses: the recording officer, the Chinese interpreter and the investigating officer. After hearing them the Court was satisfied that on a *prima facie* basis the statement was made voluntarily.

The Accused alleged that the caution was not read nor interpreted to him, that the recording officer told him "badan besar gajah pun mati", that the recording officer did not give him food and drink when he asked for them and that most of the statement was not his and was not read back to him. The Court found the allegations unreasonable and unjustified. The Accused could not explain the meaning or significance of the expression "badan besar gajah pun mati" and thereby could not have felt threatened by it. It was denied by the recording officer that the accused asked for coffee and bread, but even if he had, it was appropriately refused until after everything was over. Finally the Court ruled that the cautioned statement was made voluntarily and admitted it as evidence. The Court then requested the learned Deputy to underline the discrepancies. On perusal the Court found material contradictions. In his cautioned statement the Accused stated that he collected the package from a man at a place near Ampang Jajar, whereas in Court the Accused stated that he found the plastic bag already on the motorcycle. When the learned Deputy asked him to explain the contradiction the accused said that the package which he collected from a man at Ampang Jajar was a different package. It was of floral design and it was there on the cushion seat of the motorcycle at the time of his arrest. The Court found that it was obvious the Accused was not telling the truth about the other package. The prosecution witnesses did not find nor seize any other packages except the black plastic bag containing 2 packages of drug. None of the prosecution witnesses were cross-examined about the package with the floral design nor was it put to them. The Court rejected the Accused explanation relating to the contradiction. Be that as it may the credit of the Accused without more cannot be said to have been impeached thereby and the whole of his evidence becoming unworthy. The Court evaluated the totality of his testimony in Court and his cautioned statement. In his cautioned statement he admitted carrying the two packages which subsequently was found to contain raw opium but he denied prior knowledge of the raw opium in the two packages. He further said that he collected the packages from a man at Ampang Jajar at the request of Ah Seng with instruction to deliver it to Ah Seng at a workshop at 4th mile Alor Setar/ Sg. Petani road. The Accused was arrested on his way to the workshop. The Court asked itself whether what the Accused said in his cautioned statement could be accepted as true. The answer is found in *R v. Pearce* [1979] 69 Cr. App R. 365 C.A. where the Court said as follows:

> (1) A statement which contains an admission is always admissible as a declaration against interest and in evidence of the facts admitted. With this exception a statement made by an Accused is never evidence of the facts in the statement. - See **Archbold's Pleading, Evidence and Practice in Criminal Cases** 42nd Ed. @ 1118.

The Court could not accept his cautioned statement as true and reject his testimony as false. The Accused might not be telling the truth in his cautioned statement. The Accused probably was telling the truth in Court particularly in the following material particulars:

(1) PW7, the owner of the motorcycle could not remember the date he left his motorcycle at his employer's house but nevertheless he was away for three days. It is probable therefore that the motorcycle was left there for three days and others had used it before the Accused used it that morning.
(2) The Accused's explanation that he did not check the content of the black plastic bag on the carrier of the motorcycle seemed reasonable. There was nothing inherently suspicious about it that he should check its content. But he admitted that he took care of the bag in the sense that he kept the motorcycle within sight when he had his breakfast. An imputation of knowledge of the drug is misconceived.
(3) The accused did not behave in any way suggestive of knowledge of the drug contained in the bag. If he indeed struggled to free himself which he denied, it was not unusual as he was dragged by the arm by unidentified persons.
(4) The prosecutor's assailable cross-examination was answered with fairly reasonable answers and explanations as to why he did not leave the plastic bag at the house or with the children, why he used the motorcycle and where he went that morning and which road he proceeded on and why.
(5) The Accused denied knowledge of the raw opium contained in the plastic bag both in his testimony in Court and also in his cautioned statement and this was not substantively challenged by the prosecution.

Having considered the defence in its totality the Court found that the defence had rebutted on the balance of probabilities the presumption that the accused knew that the contents of the plastic bag which was found under his control and custody was raw opium and that on a balance of probabilities he had rebutted the presumption that he was trafficking in raw opium.

Thereupon the Court acquitted and discharged the Accused of the charge.

PUBLIC PROSECUTOR

v.

SAW KOK LEONG

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47(58)-46-88]
20 JULY 1993

DANGEROUS DRUGS: Charge of trafficking in heroin - Submission of no case to answer - Whether there was a break in the chain of handling of the drug exhibits.

CRIMINAL LAW & PROCEDURE: Exculpatory cautioned statement - Whether contents of cautioned statement could be used in submission of no case to answer - Whether contents of cautioned statement could serve to rebut statutory presumptions arising under s. 37(d) & (da) Dangerous Drugs Act 1952.

The accused was charged with trafficking in heroin contrary to the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). At the close of the case for the prosecution, in a submission of no case to answer, Counsel for the accused sought to use the cautioned statement of the accused which was wholly exculpatory in nature. Counsel further contended that there was a break in the chain of handling of the offending drug exhibits it being common ground that the drug exhibits were not marked in any manner by any of the prosecution witnesses.

Held:

[1] It was impermissible to ground the submission of no case to answer on the cautioned statement, it being a voluntary out of Court statement by the accused which could not by itself serve to rebut a statutory presumption. Thus the cautioned statement should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution since such statements could not be tested by cross-examination until the defence has been called.

[2] The drug exhibits were kept in a very cavalier manner thus permitting accessibility to persons other than the storekeeper on duty. However the fact that the exhibits were sealed with four Jabatan Kimia seals, at least three of which were virtually intact, was satisfactory evidence that the exhibits had not been tampered with duing the material period.

[3] The non-marking or non-initialling of the drug exhibits was not by itself fatal to the